

Order

Michigan Supreme Court
Lansing, Michigan

December 9, 2008

Clifford W. Taylor,
Chief Justice

ADM File No. 2006-43

Michael F. Cavanagh

ADM File No. 2007-07

Elizabeth A. Weaver

Marilyn Kelly

Proposed Amendment of

Maura D. Corrigan

Rule 2.112 of the

Robert P. Young, Jr.

Michigan Court Rules

Stephen J. Markman,
Justices

On order of the Court, this is to advise that the Court is considering amendment of Rule 2.112 of the Michigan Court Rules. Before the Court determines whether the proposal should be adopted, changed before adoption, or rejected, this notice is given to afford interested persons the opportunity to comment on the form or the merits of the proposal or to suggest alternatives. The Court welcomes the views of all. This matter will be considered at a public hearing by the Court before a final decision is made. The schedule and agendas for public hearings are posted on the Court's website at www.courts.mi.gov/supremecourt.

Publication of this proposal does not mean that the Court will issue an order on the subject, nor does it imply probable adoption of the proposal in its present form.

[Deletions are indicated by strikeover and insertions by underline.]

Rule 2.112 Pleading Special Matters

(A)-(K)[Unchanged.]

(L) Medical Malpractice Actions. In an action alleging medical malpractice filed on or after October 1, 1993, each party must file an affidavit as provided in MCL 600.2912d; and 600.2912e.

(1) *Sufficiency of Affidavit.* An affidavit of merit filed under MCL 600.2912d is presumed to be valid and tolls the period of limitations. However, if the court determines upon a party's challenge to the sufficiency of the affidavit that the affidavit is deficient, the court shall dismiss the action without prejudice. Following dismissal, the plaintiff may file a complaint

accompanied by a conforming affidavit of merit within the time that remains in the period of limitations.

- (2) Notice. Notice of filing ~~an~~the affidavit under MCL 600.2912d or 600.2912e must be promptly served on the opposing party. If the opposing party has appeared in the action, the notice may be served in the manner provided by MCR 2.107. If the opposing party has not appeared, the notice must be served in the manner provided by MCR 2.105. Proof of service of the notice must be promptly filed with the court.

Staff Comment: This proposed amendment would clarify the rules regarding affidavits of merit as expressed in *Kirkaldy v Rim*, 478 Mich 581 (2007). It would establish a presumption of validity for an affidavit of merit upon filing and would require that a party challenge the sufficiency of an affidavit of merit before it can be determined to be deficient. If a court finds the affidavit deficient, the action would be dismissed. The party would then have the period of time remaining in the statutory limitations period in which to file a complaint with a conforming affidavit of merit.

The staff comment is not an authoritative construction by the Court.

A copy of this order will be given to the secretary of the State Bar of Michigan and to the State Court Administrator so that they can make the notifications specified in MCR 1.201. Comments on these proposals may be sent to the Supreme Court Clerk in writing or electronically by April 1, 2009, at P.O. Box 30052, Lansing, MI 48909, or MSC_clerk@courts.mi.gov. All comments received within the public comment period will be posted on the Court's website at www.courts.mi.gov/supremecourt/resources/administrative/index.htm. When filing a comment, please refer to ADM File No. 2007-07 and ADM File No. 2006-43.



I, Corbin R. Davis, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

December 9, 2008

Corbin R. Davis
Clerk